U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 21-0521 BLA

LEE R. HAYES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED: 5/10/2023
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Lee R. Hayes, Lebanon, Virginia.

Kendra R. Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for Employer.

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, ROLFE and JONES, Administrative Appeals Judges.

ROLFE and JONES, Administrative Appeals Judges:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order Denying Benefits (2018-BLA-05956) rendered on a subsequent claim filed on April 12, 2016[2] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation that Claimant had at least twenty-five years of underground coal mine employment. She also found Claimant established a totally disabling respiratory impairment and thus invoked the presumption at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018). However, she found Employer rebutted the presumption by disproving the presence of pneumoconiosis and denied benefits. 20 C.F.R. §718.305.

On appeal, Claimant generally challenges the denial of benefits. Employer responds in support of the denial of benefits but argues that the ALJ erred in finding total disability established and the Section 411(c)(4) presumption invoked.[4] The Director, Office of Workers' Compensation Programs (the Director), filed a response, urging the Benefits

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[1] Vicki Combs, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested the Benefits Review Board review the ALJ's decision on Claimant's behalf, but Ms. Combs is not representing Claimant on appeal. *See Shelton v. Claude V. Keene Trucking Co*., 19 BLR 1-88 (1995) (Order).

[2] This is Claimant's third claim for benefits. Director's Exhibit 1. Claimant's most recent prior claim, filed on June 15, 2007, was denied by ALJ Paul C. Johnson, Jr. in a Decision and Order issued on December 2, 2011. *Id*. Although ALJ Johnson found Claimant invoked the Section 411(c)(4) presumption that his totally disabling respiratory impairment was due to pneumoconiosis, he found Employer rebutted the presumption. *Id*. Claimant appealed to the Board, which affirmed the denial of benefits. *Hayes v. Clinchfield Coal Co.*, BRB No. 12-0178 BLA (Dec. 21, 2012) (unpub.).

[3] Under Section 411(c)(4) of the Act, Claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

[4] We affirm, as unchallenged on appeal, the ALJ's determination that Claimant established at least twenty-five years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

Review Board to vacate the ALJ's finding that Employer rebutted the presumption because she did not properly shift the burden of proof to Employer.

In an appeal filed without representation, the Board addresses whether substantial evidence supports the Decision and Order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Invocation of the Section 411(c)(4) Presumption- Total Disability

To invoke the Section 411(c)(4) presumption, a claimant must establish the miner had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable and gainful work. *See* 20 C.F.R. §718.204(b)(1). Claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Defore v. Ala. By-Products Corp.*, 9 BLR 1-27, 1-28-29 (1988); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). The ALJ found Claimant established total disability based on the pulmonary function study evidence and the evidence overall.[6] Decision and Order at 6, 9.

Employer argues that the ALJ failed to consider Drs. McSharry's and Sargent's opinions that Claimant's pulmonary function studies do not indicate the presence of a

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit as Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 21.

[6] The ALJ found Claimant did not establish total disability based on the blood gas study evidence and found no evidence of cor pulmonale with right sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 6-7. She also found the medical opinion evidence neither supports nor refutes total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 9.

totally disabling respiratory impairment when considering his age at the time of the examinations.[7] Employer's Response Brief at 13-16.

Employer's challenge to total disability in the current claim conflicts with its concession in the prior claim that Claimant is totally disabled. In its initial closing brief to ALJ Paul C. Johnson, Jr., Employer conceded that Claimant is totally disabled based on the medical opinion evidence. Director's Exhibit 1 (Employer's 2009 Closing Argument at 14). After remand from the Board, directing ALJ Johnson to consider whether the Section 411(c)(4) presumption could be invoked, Employer again conceded that Claimant is disabled under Section 718.204(b)(2)(iv) and "[t]herefore, [C]laimant invoked the [Section 411(c)(4)] presumption." Director's Exhibit 1 (Employer's Closing Argument on Remand at 8).

Section 725.309(c)(5) controls the balance between finality of claims and allowing reconsideration of findings in subsequent claims such as this. It provides:

> If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see § 725.463), will be binding on any party in the adjudication of the subsequent claim. *However, any stipulation made by any party in connection with the prior claim will be binding on that party in the adjudication of the subsequent claim*.

20 C.F.R. §725.309(c)(5) (emphasis added). Thus, where a party knowingly concedes an issue in a prior claim, it is binding on that party in the adjudication of the subsequent claim. *Id.*; *see also* 62 Fed. Reg. 3337, 3353 (Jan. 22, 1997) ("Where a party's waiver of its right to litigate a particular issue represents a knowing relinquishment of that right, such waiver should be given the same force and effect in subsequent litigation of the same issue.").

Because Employer specifically and knowingly conceded that Claimant is totally disabled and invoked the Section 411(c)(4) presumption in the prior claim, it is bound by its concession in this subsequent claim. 20 C.F.R. §725.309(c)(5). Thus, we decline to consider its arguments regarding the ALJ's errors on total disability and affirm the ALJ's

[7] Claimant was between the ages of seventy-eight years old and eighty-two years old when his pulmonary function studies were conducted. Director's Exhibit 14, 27; Employer's Exhibit 3; Claimant's Exhibits 5-6. The tables used to determine whether a pulmonary function study is qualifying for total disability stop at age seventy-one. 20 C.F.R. Part 718, Appendix B.

finding that Claimant established total disability and invoked the Section 411(c)(4) presumption.[8] Decision and Order at 9.

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal[9] nor clinical pneumoconiosis,[10] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer rebutted the presumption by establishing that Claimant has neither clinical nor legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

The Director argues that the ALJ did not shift the burden to Employer to affirmatively disprove both clinical and legal pneumoconiosis as required by the Section 411(c)(4) presumption, but instead found rebuttal because the evidence "did not support a

[8] Although acknowledging stipulations are binding in subsequent claims -- and not attempting to explain how Employer's repeated admissions could be viewed as anything other than unequivocal stipulations -- our dissenting colleague nonetheless argues that because no party has raised the issue, we should remand it "for the ALJ to make a determination as to whether there has been a stipulation[.]" *See infra* at 9. But the Board's rules do not require unrepresented petitioners to file an opening brief or identify the issues on appeal. 20 C.F.R. §§802.211, 802.22. Instead, the Board must conduct its own review of the decision below to ensure it is supported by substantial evidence and consistent with the law. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). Here, the law is clear that stipulations are binding. 20 C.F.R. §725.309(c)(5). And Employer's repeated admissions plainly speak for themselves. *See, e.g.*, Director's Exhibit 1 (Employer's 2009 Closing Argument at 14) ("*Therefore, [C]laimant is disabled under §718.204(b)(2)(iv)*."). No more is required.

[9] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[10] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

finding of those diseases." Director's Response Brief at 1. Employer argues that the ALJ properly weighed the evidence regarding clinical and legal pneumoconiosis to find them both rebutted. Employer's Response Brief at 3-12. We agree with the Director's argument.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A).

The ALJ considered the medical opinions of Drs. Forehand, Sargent, and McSharry. Decision and Order at 11. Dr. Forehand opined Claimant has legal pneumoconiosis in the form of obstructive lung disease caused by cigarette smoking and coal mine dust exposure. Director's Exhibits 14, 30. Dr. Sargent asserted that Claimant does not have legal pneumoconiosis but rather has asthma, which is not caused by coal mine dust exposure. Director's Exhibit 27; Employer's Exhibit 5. Dr. McSharry also opined Claimant does not have legal pneumoconiosis but instead has asthma not caused by coal mine dust exposure.[11] Employer's Exhibits 3-4. The ALJ afforded "some weight" to each opinion and found "they do not support a finding that Claimant suffers from a chronic lung disease or impairment and its sequelae arising out of coal mine employment" and therefore determined Employer rebutted the presumption of legal pneumoconiosis. Decision and Order at 11-12.

The Administrative Procedure Act (APA) requires the ALJ to consider all relevant evidence in the record, and to set forth her "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). While the ALJ summarized the opinions of Drs. Forehand, Sargent, and McSharry, she did not make any findings regarding the credibility of each opinion as to the role coal mine dust played in Claimant's obstructive disease, which all the physicians agreed is present. Decision and Order at 11-12. Because the ALJ provided no analysis of the physicians' opinions and failed to resolve the conflict in the evidence, her findings are not in compliance with the APA. U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz*, 12 BLR at 1-165.

[11] Both Drs. Sargent and McSharry acknowledged that coal mine dust can aggravate asthma but indicated that such effect would resolve when removed from the environment. Director's Exhibit 27; Employer's Exhibit 4 at 24-25; Employer's Exhibit 5 at 22.

Moreover, rather than determining whether the evidence rebutted the existence of legal pneumoconiosis, the ALJ instead found it does not *support* a finding of legal pneumoconiosis. Decision and Order at 11-12. The ALJ thus failed to properly evaluate whether Employer met its burden to establish that Claimant's coal mine dust exposure did not "significantly contribute to, or substantially aggravate," his obstructive impairment and instead erroneously placed the burden of proof on Claimant. 20 C.F.R. §§718.201(a)(2),(b), 718.305(d)(1)(i)(A); *see W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 134-35 (4th Cir. 2015); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). We therefore vacate the ALJ's finding that the medical opinion evidence, and the evidence overall, established Claimant does not have legal pneumoconiosis as well as the determination that Employer rebutted the Section 411(c)(4) presumption. 20 C.F.R. §§718.201(a)(2), 718.202(a)(4), 718.305(d)(1)(i)(A); Decision and Order at 11-12.

Clinical Pneumoconiosis

To disprove clinical pneumoconiosis, Employer must establish Claimant does not have any of the diseases "recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §§718.305(d)(1)(i)(B), 718.201(a)(1).

The ALJ considered nine interpretations of four x-rays dated July 18, 2016, December 23, 2016, July 12, 2017, and June 10, 2020. Decision and Order at 10. She noted that of the interpreting physicians, Drs. Wolfe, Alexander, Crum, Tarver, Miller, and DePonte are dually qualified as Board-certified radiologists and B readers, whereas Dr. Forehand is a B reader only. Decision and Order at 10-11.

Drs. Wolfe and Forehand interpreted the July 18, 2016 x-ray as negative for pneumoconiosis while Dr. Alexander interpreted it as positive for the disease. Director's Exhibits 14, 26; Claimant's Exhibit 4. Dr. Tarver interpreted the December 23, 2016 x-ray as negative for pneumoconiosis, while Dr. Crum interpreted the x-ray as positive. Director's Exhibit 27; Claimant's Exhibit 2. Dr. Tarver interpreted the July 12, 2017 x-ray as negative for pneumoconiosis, while Dr. Miller interpreted the x-ray as positive. Employer's Exhibit 2; Claimant's Exhibit 1. Finally, Dr. Tarver interpreted the June 10, 2020 x-ray as negative for pneumoconiosis while Dr. DePonte interpreted it as positive. Employer's Exhibit 3; Claimant's Exhibit 3.

The ALJ found the July 18, 2016 x-ray to be negative for pneumoconiosis as two of the three physicians read the x-ray as negative. Decision and Order at 10. She found the remaining three x-rays to be in equipoise because an equal number of physicians read the

x-rays as positive and negative. Decision and Order at 10-11. She found Employer rebutted the presumption because the x-ray evidence "does not support a finding of pneumoconiosis." *Id.* at 11.

In evaluating whether Employer rebutted the presumption of clinical pneumoconiosis, the ALJ erroneously placed the burden of proof on Claimant to establish he has the disease. Decisional and Order at 11. Specifically, she improperly assessed whether the preponderance of the evidence establishes the existence of pneumoconiosis. *Id.* Clinical pneumoconiosis is presumed to exist in this case where invocation of the Section 411(c)(4) presumption is established. The ALJ was tasked with evaluating whether Employer disproved its existence by establishing, by a preponderance of the evidence, Claimant does not have clinical pneumoconiosis. *Smith*, 880 F.3d at 699; *Bender*, 782 F.3d at 134-35; *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 554-59 (4th Cir. 2013). Thus, we vacate the ALJ's finding that the x-ray evidence rebuts the presumption of clinical pneumoconiosis. Decisional and Order at 11.

Moreover, the ALJ failed to address the physicians' medical opinions on the issue of clinical pneumoconiosis.[12] *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-53 (4th Cir. 2016); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand); Director's Exhibits 14, 27, 30; Employer's Exhibits 3-5. Because the ALJ failed to weigh the evidence using the proper burden of proof and failed to consider relevant evidence, we must vacate her determination that Employer rebutted the presumption of clinical pneumoconiosis. 20 C.F.R. §§718.201(a), 718.202(a)(1), 718.305(d)(1)(i)(B); Decision and Order at 11.

Remand Instructions

On remand, the ALJ must reconsider if Employer has rebutted the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. In determining whether Employer established rebuttal of the presumption, the ALJ should determine whether Employer has established rebuttal at 20 C.F.R. §718.305(d)(1)(i) by disproving the presumed existence of both legal and clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A), (B); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 159 (2015). In so doing, the ALJ should first consider whether Employer has affirmatively established the absence of legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A).

When weighing the medical opinion evidence on the issue, the ALJ must consider the physicians' qualifications, explanations for their conclusions, the documentation

[12] A mere restatement of an x-ray does not constitute a reasoned medical opinion. 20 C.F.R. §§718.202(a)(1), (4), 725.414(a).

underlying their medical judgements and the sophistication of, and bases for, their diagnoses and medical conclusions. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439 (4th Cir. 1997). In so doing, she must set forth her findings in detail, including the underlying rationale. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz*, 12 BLR at 1-165.

If the ALJ determines that Employer has failed to establish the absence of legal pneumoconiosis, she should then determine whether Employer has disproven the presence of clinical pneumoconiosis arising out of coal mine employment at Section 718.305(d)(1)(i)(B). In doing so, the ALJ must consider all relevant evidence and explain her underlying rationale as required by the APA. *Wojtowicz*, 12 BLR at 1-165.

If the ALJ determines Employer has established Claimant does not have clinical or legal pneumoconiosis, Employer will have rebutted the Section 411(c)(4) presumption by establishing the absence of pneumoconiosis. If she finds Employer has not rebutted the presumed fact of either clinical or legal pneumoconiosis, she must consider whether Employer has established that no part of Claimant's total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). If Employer proves that Claimant does not have legal and clinical pneumoconiosis, or no part of his disabling pulmonary impairment was caused by legal and clinical pneumoconiosis, Employer has rebutted the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1); *Minich*, 25 BLR at 1-159. If Employer fails to do so, however, Claimant is entitled to benefits.

Accordingly, the ALJ's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring and dissenting:

I agree with my colleagues that, in the proceedings before the ALJ in Claimant's previous claim, Employer stated Claimant was entitled to invoke the Section 411(c)(4) presumption as a consequence of the medical opinions which had been submitted. However, no party to this case has contended that Employer's statement constituted a binding stipulation. Moreover, the parties premised their submissions on the assumption that disability was an issue. Consequently, I would remand for the ALJ to make a determination as to whether there has been a stipulation, after giving the parties an opportunity to address that issue. And, if she found there was a stipulation, allow the ALJ to enable the parties to submit revised briefing or to proceed as my colleagues have ordered; if she found to the contrary, she would reconsider whether disability has been established in this subsequent claim, addressing the arguments raised by Employer, as those were matters properly raised by the testimony of Employer's experts and by Employer, but not addressed, by the ALJ. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*,

9 BLR 1-236 (1987) (en banc); Employer's Response Brief at 13-16. In all other respects, I agree with my colleagues.

JUDITH S. BOGGS
Administrative Appeals Judge